

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 -against-

6 JOAQUIN ARCHIVALDO GUZMAN
7 LOERA,

8 Defendant.

09-CR-466 (BMC)

United States Courthouse
Brooklyn, New York

May 5, 2017
9:30 a.m.

9 TRANSCRIPT OF CRIMINAL CAUSE FOR CURCIO HEARING
10 BEFORE THE HONORABLE BRIAN M. COGAN
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES

For the Government:

BRIDGET M. ROHDE, ESQ.
Acting United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: HIRAL D. MEHTA
PATRICIA E. NOTOPOULOS
MICHAEL P. ROBOTTI
GINA PARLOVECCHIO
Assistant United States Attorneys

17 For the United States:
18 Department of Justice

NARCOTIC AND DANGEROUS DRUG
145 N. Street N.E.
Suite 300
Washington, DC 20530
BY: ANDREA GOLDBARG
AMANDA LISKAMM
MICHAEL LANG
ANTHONY NARDOZZI
Assistant United States Attorneys

UNITED STATES DEPARTMENT OF JUSTICE
99 NE 4th Street
Miami, Florida 33132-2131
BY: LYNN KIRKPATRICK
Assistant United States Attorney

25 Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 APPEARANCES (Continued)

2 For the Defendant: FEDERAL DEFENDERS OF NEW YORK
3 One Pierrepont Plaza
4 Brooklyn, NY 11201
5 BY: MICHELLE A. GELERNT, ESQ.
MICHAEL K. SCHNEIDER, ESQ.
EDWARD SCOTT ZAS, ESQ.

6 For the Defendant: DEBEVOISE & PLIMPTON
7 919 Third Avenue
8 New York, New York 10022
9 BY: MATTHEW E. FISHBEIN, ESQ.
EMMANUEL FASHAKIN, JR., ESQ.

10 Interpreters: MARISTELA VERASTEGUI
11 ESTRELLITA MENDEZ PLESTED

12 Court Reporter: LINDA D. DANELCZYK, RPR, CSR, OCR
13 Phone: 718-613-2330
14 Fax: 718-804-2712
15 Email: LindaDan226@gmail.com
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18
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1 (In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning. Have a seat, please.

4 THE COURTROOM DEPUTY: United States versus Guzman,
5 Docket Number 09-CR-466.

6 Counsel, please state your appearances starting with
7 the government.

8 MS. GOLDBARG: Good morning, Your Honor --

9 THE COURT: Before you start, Ms. Goldbarg.

10 MS. GOLDBARG: Yes, Your Honor.

11 THE COURT: There's a lot of you here.

12 MS. GOLDBARG: There is.

13 THE COURT: So let me just have the names of those
14 who might conceivably be speaking.

15 MS. GOLDBARG: Yes, Your Honor.

16 Today, based on the Court's instructions, Patricia
17 Notopoulos, Gina Parlovecchio and Andrea Goldbarg.

18 THE COURT: Okay.

19 MS. GOLDBARG: Thank you.

20 THE COURT: Thank you.

21 MS. GELERNT: Good morning, Your Honor, Federal
22 Defenders by Michelle Gelernt, G-E-L-E-R-N-T, and Mike
23 Schneider and Edward Zas.

24 MR. SCHNEIDER: Good morning, Your Honor, Mathew
25 Fishbein from Debevoise & Plimpton as Curcio counsel. I'm

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1 here with my associate, Emmanuel Fashakin.

2 THE COURT: All right. Good morning, counsel. Good
3 morning, Mr. Guzman.

4 I'll note for the record that Mr. Guzman is wearing
5 headphones and receiving simultaneous translation of the
6 proceedings as we go on.

7 I want to thank the attorneys for the agenda you got
8 me, that's very helpful. As you can see from the written
9 decision I issued yesterday, I took one of the items off that
10 agenda.

11 But I do want to say that with regard to the matters
12 addressed in that decision, I think the best thing for all
13 concerned is we really should start moving this case towards
14 the earliest reasonable trial date that we can and we're going
15 to start that process today.

16 But first I think the first item of business is the
17 Curcio hearing, based on the issue that the government has
18 raised. I will say, based on the exchanges that the parties
19 have had with me and now I think I understand the full extent
20 of the issue, I'm not sure a Curcio hearing is required.
21 We're going to do it, we're definitely going to do as a
22 belt-and-suspenders measure, but the prior representation that
23 creates the issues was so fleeting, it seems to me, and so
24 removed from these particular federal public defenders that
25 it's barely an issue. But for the sake of good order, we will

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1 go ahead and do that.

2 Any reason why we shouldn't start that hearing now?

3 MS. GELERNT: No, Your Honor.

4 MS. GOLDBARG: No, Your Honor.

5 THE COURT: Okay. First, let me ask a few questions
6 before I start the required dialogue with the defendant of the
7 federal public defenders.

8 Do either of you recall any conversations with your
9 colleagues about their representation of any of the witnesses
10 involved?

11 MR. SCHNEIDER: No, Your Honor, and prior to our
12 last appearance, we were given the names of the witnesses.

13 THE COURT: Right.

14 MR. SCHNEIDER: From the government. There was one
15 who had been represented for a lengthier period of time than
16 the others and we had what we would call a firewall counsel, a
17 supervisor in our southern district office, speak to that
18 lawyer regarding the representation. So we haven't spoken to
19 anybody and we never had any personal dealing with any of the
20 defendants that the government's referring to as cooperating
21 witnesses or cooperating sources.

22 THE COURT: Okay. So your knowledge level is zero,
23 right?

24 MR. SCHNEIDER: That's correct.

25 THE COURT: Okay. And I assume you're speaking for

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1 Ms. Gelernt as well.

2 MR. SCHNEIDER: Yes.

3 MS. GELERNT: And Mr. Zas as well, Your Honor.

4 THE COURT: Right, and Mr. Zas. Okay.

5 In addition, do you have any access to the case
6 files involving those potential witnesses?

7 MR. SCHNEIDER: No. We believe they are probably
8 archived now but we have no access to them. And if we remain
9 on the case, obviously we will have no access to them.

10 And as the Court is aware, I don't believe discovery
11 was received in any of them.

12 THE COURT: All right. Okay. And then lastly, let
13 me ask: Do either of you, I mean the three of you, feel the
14 slightest compunction that you might be restricted in
15 cross-examining any of these witnesses based on their prior
16 representation by federal public defenders?

17 MR. SCHNEIDER: No.

18 THE COURT: Okay. All right. That's a good start.

19 Now, I wanted to also ask the government, there were
20 a couple -- there was some number of these witnesses from whom
21 the government got express waivers of attorney/client
22 privilege and some for whom it didn't. And what I'd like to
23 know is, as to those that it didn't, why not?

24 You know, you got cooperation agreements, what stops
25 the government from saying to them, especially when the prior

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1 representation was so insubstantial, waive it or you're
2 breaching your cooperation agreement?

3 MS. NOTOPOULOS: Your Honor, these witnesses are
4 witnesses that were sentenced already, and to say that their
5 breaching, I don't know that we can compel a witness. In past
6 cases we have not compelled witnesses to waive the
7 attorney/client privilege, the problem is that the government
8 either have to forego calling the witness, or what has usually
9 happened is the courts have the either curtailed or prevented
10 cross-examination from the defense.

11 So there's a broad spectrum of the things it can do,
12 but we have not ever compelled a witness to waive the
13 attorney/client privilege.

14 THE COURT: Well, what would you do if I said to you
15 you can't call the witness unless you get a waiver?

16 MS. NOTOPOULOS: Your Honor, we may not be able to
17 call the witness.

18 THE COURT: Okay. In other words, you're saying you
19 don't have any leverage any more because it's post-sentencing;
20 is that right?

21 MS. NOTOPOULOS: That is correct, Your Honor, and I
22 don't think, as a matter of policy, that we have in the past
23 compelled a witness to do that.

24 Now, one thing we can do is get a compulsion order,
25 which would alleviate the attorney/client privilege, and that

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1 would normally be another way to resolve these problems.

2 THE COURT: Right. I mean it does seem to me that
3 these witnesses, to the extent they got as a standard
4 protection from prosecution from crimes beyond those to which
5 they pled, if you declared a breach and they had that exposure
6 all of a sudden, they might change their minds. I don't know.

7 Do any of the defense counsel have any feeling about
8 that?

9 MR. SCHNEIDER: I have a lot of feelings. This
10 isn't the first time this has come up in this courthouse. You
11 know, I represented somebody charged with terrorism and the
12 government called me and said we had a conflict because we
13 represented a witness and our representation of that witness
14 was substantial, you know, through a cooperation agreement, so
15 I got off the case. That person never testified. And that
16 annoyed me.

17 These people who have been sentenced and are no
18 longer under a cooperation agreement, I understand the
19 government has to bring that to the Court's attention but, you
20 know, the likelihood they are going to testify is probably
21 slight. There are ways we can deal with it. A CJA counsel
22 could be appointed if it became necessary, if there was some
23 sort of privileged material we were privy to, which I don't
24 think is going to happen, but there are other ways to deal
25 with it where another lawyer can perform the

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1 cross-examination.

2 THE COURT: Okay.

3 MR. SCHNEIDER: I don't think we're ever going to
4 get that far.

5 THE COURT: All right. Well, I don't know if we
6 will or we won't, Mr. Schneider, but I will say that for
7 today's purposes I don't think I have to resolve it, I just
8 want the government to understand that when it comes down to
9 trial, if you still want to call these people, I may say to
10 you at that point, get a waiver. But I don't think I need to
11 have that today for purposes of the Curcio hearing, so I'm
12 going to leave it at that for now.

13 Okay. Let's me start the dialogue with Mr. Guzman.
14 I assume that both federal public defenders and Mr. Fishbein
15 have met with him and gone over the nature of the disclosure
16 that the government the gave as to each of these witnesses; is
17 that right?

18 MS. GELERNT: That's correct, Your Honor. And
19 Mr. Fishbein had the Curcio letter translated, the new more
20 detailed letter, and that was reviewed both by my office with
21 Mr. Guzman and by Mr. Fishbein as well.

22 MR. FISHBEIN: And I can answer that, Your Honor.
23 We met for close to two hours with Mr. Guzman earlier in the
24 week and I'm convinced that he thoroughly understands the
25 issues, and to the extent that he's prepared to give a waiver,

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1 that that is a fully informed waiver.

2 THE COURT: Okay. All right, let me just ask
3 Mr. Guzman to confirm what counsel just said, which is, he has
4 read, reviewed and discussed the letter describing these prior
5 witnesses with his various attorneys.

6 Is that correct, Mr. Guzman?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Thank you. Give me just a
9 minute.

10 All right, Mr. Guzman, do you understand that you
11 have the right to be represented by counsel at all stages of
12 this proceeding?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Right. Now, you also need to understand
15 that part of that right is the right to have counsel that has
16 no interest at hand other than yours. That's what we call
17 "conflict free counsel."

18 Do you understand you have that right?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Now, as you know from having
21 had the letter translated to you, there are four witnesses who
22 the government says could create potential conflicts for your
23 attorneys. They're potential, doesn't mean they're really
24 going to happen, but they might happen.

25 It's because those witnesses were, for various

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1 periods, represented by other federal public defenders. The
2 somewhat unusual part of this case, Mr. Guzman, is that you
3 can't know the names of who those four witnesses are.
4 Nevertheless, you have to make a decision as to whether you
5 want to the continue to have federal public defenders
6 represent you, or whether you want me to appoint new counsel,
7 Mr. Fishbein, who has no prior exposure to any witnesses in
8 this case at all. You have the right to make that choice.

9 THE DEFENDANT: I thank you, sir, and I would like
10 to continue with my current attorneys because I feel well with
11 them.

12 THE COURT: All right. That's fine. I just want to
13 make sure you fully understand your rights so that I know
14 you're doing this in a knowing and voluntary way. So let me
15 just outline the problem for you a little bit because I know
16 your attorneys have educated you on it before.

17 These four witnesses have admitted to transporting
18 cocaine or marijuana for the Sinaloa Cartel. Some of the
19 witnesses say they met you, others say they never met you.
20 Each of the witnesses has either served or is currently
21 serving a sentence in United State's custody. In theory,
22 because the federal public defenders, not these federal public
23 defenders, but others, had some representation of those
24 witnesses in the past. These federal public defenders might
25 be restricted in going after those witnesses in

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1 cross-examination at trial. That's the problem. That's what
2 you have to decide whether you want to the accept or you're
3 perfectly free to say give me new counsel.

4 Now, the way this inquiry works between you and me,
5 is now that I've explained the problem to you, the law
6 requires you to explain it back to me so that I know you
7 understand what it is.

8 So I need you to tell me in your own words what you
9 think the potential conflict might be that you are giving up.

10 THE DEFENDANT: Well, I would waive -- I would want
11 to continue with my attorneys because I feel fine.

12 THE COURT: Yes.

13 MS. GELERNT: Your Honor, is it possible for us,
14 either Mr. Fishbein or myself, to have a moment to consult
15 with Mr. Guzman?

16 THE COURT: Either or both.

17 (Counsel conferring with the defendant.)

18 MS. GELERNT: We're ready to continue, Your Honor.

19 THE COURT: All right.

20 MR. FISHBEIN: Your Honor, before we continue, one
21 thing that would be helpful to clarify for Mr. Guzman, we have
22 done it but I think it would be helpful to have it come from
23 the Court, is that in the event that the Federal Defenders
24 could not cross-examine these witnesses, he would have someone
25 available, you know, appointed by the Court or retained to be

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1 brought in for the limited purpose of cross-examining other
2 witnesses. So they will be questioned, he will have someone
3 on his behalf questioning.

4 THE COURT: Angels on the head of a pin.

5 I think, of course, you're right, I never had to go
6 that far in one of these. But that's fine, I'll advise him of
7 that.

8 Mr. Guzman, in the event that your attorneys were to
9 tell me at trial that they could not examine a particular
10 witness because they felt they or somebody in their office had
11 an obligation to that witness not to examine them, I would at
12 that point appoint a lawyer for you to deal with that
13 particular witness.

14 I will note that your attorneys have told me they
15 see no problem cross-examining any of the witnesses that the
16 government has identified. But I think you should be aware
17 that in the event something like that happened, I could get
18 you another attorney for that particular witness that was
19 causing them a problem.

20 All right. So, Mr. Guzman, I know it's a somewhat
21 cumbersome procedure we're required to use, but I need to have
22 you explain to me what you think the problem is so I know
23 you're understanding what you are waiving.

24 THE DEFENDANT: If I understand what the conflict
25 is, it would be if these witnesses were being called, would be

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1 called to testify against me, another attorney would question
2 them.

3 THE COURT: Right, another attorney would question
4 them if your attorney says they could not question those
5 witnesses.

6 Do you understand that?

7 THE DEFENDANT: I'm sorry, I did not understand.

8 THE COURT: Okay. Let's suppose one of these
9 witnesses takes the stand. Your attorneys have said to me
10 they have no problem cross-examining these witnesses, but if
11 they changed their mind on that, I would then get you another
12 attorney to cross-examine those witnesses.

13 Do you understand that?

14 THE DEFENDANT: Yes, I understand very well. Thank
15 you.

16 THE COURT: Okay. And do you also understand that
17 if you wanted to avoid any issue about this at all, I would
18 appoint Mr. Fishbein to represent you right now, and I would
19 tell your federal public defenders not to represent you any
20 more, if you have any concerns. You have that right.

21 Do you understand that?

22 THE DEFENDANT: Thank you, but I would like to
23 continue with the attorneys I have until today.

24 THE COURT: Okay. All right. Does the government
25 think I need to allocute him any further on this?

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1 MS. NOTOPOULOS: Your Honor, I agree with the Court
2 that the level of conflict here is fairly minor, however, I
3 would ask the Court to address not only the issue of the
4 conflict in cross-examination, but because knowledge gained by
5 other Federal Defenders is imputed to these defendants -- I'm
6 sorry, to the other attorneys representing the defendant, not
7 only by the disciplinary rules but by case law, that
8 information that might have been obtained by the witnesses by
9 Federal Defenders cannot be used to help this defendant in,
10 for example, developing a defense or finding a witness. And
11 so I think that is another aspect that the Court should
12 address with the defendant outside of the problems that might
13 occur at trial if there's an actual conflict in
14 cross-examination.

15 THE COURT: All right, I will try to address that,
16 too.

17 Mr. Guzman, I want you to assume that some of the
18 federal public defender attorneys who previously represented
19 these witnesses obtained some information from them that would
20 be helpful to you if your attorneys knew that information.
21 Your attorneys would not be able to use that information
22 against these witnesses without their permission. As to two
23 of these witnesses, they've given their permission. As to two
24 of them, they have not.

25 So do you understand that your attorneys would not

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1 be able to help you with information, if there is any
2 information, that other federal public defenders might have?

3 THE DEFENDANT: Yes, sir, I do understand.

4 THE COURT: All right. And does that in any way
5 affect your decision that you don't want to change attorneys?
6 You still want to retain your current federal public defender
7 attorneys; is that correct?

8 THE DEFENDANT: Yes, sir, I want to continue with my
9 Federal Defenders attorneys.

10 THE COURT: Okay.

11 MS. NOTOPOULOS: We need a moment, Your Honor.

12 THE COURT: Sure.

13 MS. NOTOPOULOS: Your Honor, I appreciate, the
14 government is just concerned about the sufficiency of the
15 defendant's articulation of the understanding of the conflict,
16 and I would ask the Judge to elicit an answer particularly to
17 the last issue that the Court just raised with the defendant.

18 THE COURT: Okay.

19 Mr. Guzman, I've just explained to you how if your
20 attorneys came into possession of information about these
21 witnesses from the other attorneys who represented them, they
22 couldn't use that information. I need you again to explain
23 that back to me so that I know you understand it.

24 MS. GELERNT: And, Judge, if we could just have a
25 minute so we can help him form an answer.

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1 THE COURT: Yes.

2 (Counsel confers with the defendant.)

3 THE DEFENDANT: I understand that my attorneys will
4 not be able to use any private situation about these
5 witnesses.

6 THE COURT: I think this is more of a translation
7 problem than anything else. I believe he understands.

8 MS. NOTOPOULOS: I agree, Your Honor, we understand
9 the intent of his words.

10 THE COURT: Okay. I mean I will also say I
11 understand the requirements of Curcio, but I think appellate
12 judges look at what happens in the district court and
13 established this need for this dialogue that we've had, you
14 know, district judges allocute defendants under Rule 11 all
15 the time, and we look the defendant in the eye and we make a
16 judgment as to whether they understand what we're talking
17 about and that's really a superior check in my view to the
18 rather cumbersome dialogue that we're required to have in
19 this, but it is neither here nor there. I do believe the
20 defendant has allocated sufficiently in accordance with the
21 requirements of the Curcio case.

22 All right, let me just ask him a couple more
23 questions again just to complete it.

24 Mr. Guzman, have you had all the time you need to
25 consider this issue as to who your counsel should be?

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1 THE DEFENDANT: Yes, sir, I am making my own
2 decisions.

3 THE COURT: Okay. And are you fully satisfied with
4 the representation they have given you thus far?

5 THE DEFENDANT: Yes, sir, completely satisfied.

6 THE COURT: All right. And do you understand that
7 you're not going to be able to change your mind about this
8 later; that is, if you go to trial and you're convicted,
9 you're not going to be able to complain that you had attorneys
10 who had a conflict of interest?

11 Do you understand that?

12 THE DEFENDANT: Yes, sir, I'm very well aware of
13 this.

14 THE COURT: All right, anything further before I
15 make findings?

16 MS. NOTOPOULOS: No, Your Honor, thank you.

17 THE COURT: Okay.

18 Based on what I've heard today, I accept
19 Mr. Guzman's waiver of the potential conflict. I find that he
20 knowingly and voluntarily waived it. He's had two sets of
21 attorneys explain it to him. He's also had me explain it to
22 him. He was able to intelligently summarize the conflicts to
23 the Court, as well as I think any lay witness could and, it's
24 clear that he has been thoroughly informed of the potential
25 conflicts and understands the issues that they could present.

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1 Also, as I said at the beginning, because of the
2 very minor nature of the potential conflict, not only is it
3 waivable, but I think it's waivable fairly easily. So I
4 accept the waiver of potential conflict under Curcio, and
5 Mr. Schneider and Ms. Gelernt will remain as counsel to the
6 defendant. And I do want to specifically thank Mr. Fishbein
7 for his input and his advice on this.

8 All right, the next thing I want to turn to on the
9 agenda is the proposed motion to dismiss concerning
10 extradition that defense counsel wants to make. I have some
11 questions about this. I understand you want discovery that
12 the government isn't willing to give you before you make the
13 motion, but I don't understand why you haven't made the motion
14 for discovery.

15 MS. GELERNT: Your Honor, we have in some senses
16 made the motion for discovery. We filed, I believe in
17 addition to the oral request since the January 20th hearing we
18 filed, three letters with the government. I believe it was
19 January 26th, January 31st, and most recently on April 21st we
20 filed letters requesting the discovery and renewing our
21 previously requests, so that's four times now we've requested
22 discovery.

23 THE COURT: Okay.

24 MS. GELERNT: And then in our motion, letter motion
25 on April 21st, we again requested the discovery.

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1 If the Court's position is that we should request
2 this discovery more formally in terms of a motion to compel
3 discovery, we can do that. We had originally thought that
4 based on the government's position on April 28th, we would ask
5 you for some time to respond in the form of a reply, but
6 perhaps what would be more proper in the circumstance would be
7 to not file it as a reply but do it as a motion to compel
8 discovery. The government will have an opportunity to answer
9 and then the Court can render a decision.

10 I think if we schedule it that way, then we can let
11 you know -- then we could also either today schedule out the
12 motion schedule for the rule of specialty, motion to dismiss
13 based on when we anticipate a decision on this discovery
14 motion. So that might be the best way to proceed.

15 THE COURT: Okay, I leave it entirely up to you.
16 I'm happy to deem the prior oral and written references as the
17 motion to compel discovery, if you want to rest on that, and
18 then, of course, I'll give you reply because I've had a pretty
19 full statement of the government's opposition to that. But if
20 you want to file a formal motion that's fine, too. So it's
21 entirely up to you.

22 MS. GELERNT: I mean, can I have a moment to consult
23 with my colleagues?

24 THE COURT: Sure. Sure.

25 (Pause.)

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1 MS. GELERNT: Your Honor, if the Court is prepared
2 to deem the prior filings as a motion to compel, then we will
3 just file a reply, that way it may us some time since the
4 Court indicated the desire to move the case forward.

5 THE COURT: Okay. When would you like to do that?

6 MS. GELERNT: I was going to suggest, if possible,
7 May 19th, which I believe is a Friday, for our reply.

8 THE COURT: Okay. That's fine.

9 MS. GOLDBARG: Your Honor, if the defense lawyers
10 were to raise new issues in their reply brief that weren't
11 raised in the original motion, the government would ask for
12 permission to be able to reply to those new arguments.

13 THE COURT: Let's say you're reserving your right.

14 MS. GOLDBARG: Yes, sir.

15 THE COURT: Let's wait and see what's in the rely,
16 and if you still feel that need, I will note that you
17 mentioned it now and we'll deal with it then.

18 MS. GOLDBARG: Thank you, Your Honor.

19 THE COURT: Okay. Now, let's say it ends on the
20 19th and the reply is the last paper, I think I could get a
21 decision out within a week, which would be the 26th, and then
22 the question becomes when to file the motion to dismiss. But
23 that to me, it seems, is going to be somewhat dependent on
24 whether and how much discovery I get to you, I allow you and
25 the time it takes the government to produce it, although it

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1 shouldn't take much time, based on what you've asked for, if I
2 do order it.

3 MS. GELERNT: I think then it's fine, Your Honor.
4 When we get the decision the parties can speak amongst
5 themselves and present the Court with a schedule that we
6 believe is reasonable based on the Court's order.

7 THE COURT: Okay. The only thing I would ask is you
8 keep it reasonably short, do the best you can; you know, no
9 one has to give up family weddings or anything, but make it
10 reasonably short.

11 MS. GELERNT: Certainly, Your Honor.

12 THE COURT: Okay. So I won't set a fixed schedule
13 on the motion to dismiss now, I'll wait to hear from the
14 parties some time shortly after I render the decision which
15 will be by May 26th. Okay.

16 The next thing I think we have to deal with is I'd
17 like to set a trial schedule, like a trial date so we lock it
18 in -- yes, there's a problem.

19 MS. GELERNT: There's no problem with that, Your
20 Honor, but just before we move on from the discovery issues,
21 one of the items on the agenda was the defense team's need for
22 contact with Mr. Guzman.

23 THE COURT: Right.

24 MS. GELERNT: We have made a proposal that we think
25 is reasonable and easy to achieve and is secure. There are

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1 two types of counsel booths, I know we described this to you
2 in the SAMs litigation. We're always locked in to the counsel
3 room. So there's a larger counsel room where we get locked
4 in, and that booth in particular they have now given
5 Mr. Guzman some sort of bar stool. He sits behind a glass
6 that has even more metal sort of blocking it, and where the
7 speaker holes are on that booth it's very difficult to hear.

8 I don't think it's reasonable, especially if we're
9 looking forward to as early a trial date as possible, that we
10 can review voluminous discovery. As of this morning, the
11 government indicated they were providing us with or we've
12 acknowledged receipt of what they claim to be close to 1500
13 recordings.

14 It's simply not feasible that we're going to be able
15 to review this type of evidence with Mr. Guzman on one side of
16 a plexiglass wall either playing a speaker to us or us playing
17 a speaker to him. What we proposed is perfectly securely and
18 really Mr. Guzman's right to have contact visits, which isn't
19 precluded by the SAMs, it specifically allowed by the SAMs
20 shouldn't be precluded by the MCC not being equipped to honor
21 his right to a contact visit. We personally feel that there
22 is a secure way to do this. And I know Your Honor in the SAMs
23 portion rejected the right for outside overseer to view the
24 situation, but the government had suggested as well that the
25 Court could also view the area. So if the Court was not

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1 prepared to accept our representation about the way this can
2 be facilitated, we can suggest that either Your Honor, or in
3 your decision you also mention the possibility of an assigned
4 magistrate dealing with some of these types of issues could
5 actually review what we're proposing. But I just don't think
6 months of preparation with our client can take place separated
7 by a plexiglass wall listening to hours and hours of
8 recordings.

9 THE COURT: You know, my difficulty is that I
10 really, as I indicated in the decision yesterday, I don't want
11 to get in a position of micromanaging everything. And the
12 concern you're raising, while I recognize it makes it harder,
13 I don't think even you contend that it rises to a
14 Sixth Amendment violation level; do you?

15 MS. GELERNT: Your Honor, I think it does, and I
16 would point to the Savage case where the MCC had went beyond
17 what we're asking for, and that was a defendant who had
18 actually -- I believe the accusation was that he had had
19 somebody killed while he was in custody in the United States
20 and was actually physically transported down to Philadelphia
21 to have contact visits with his attorneys. We're not asking
22 for that. We're saying just lock us on the same side of
23 counsel booth that you already have prepared.

24 So we do think it rises to that and what we don't
25 want to happen is constantly coming back and not being able to

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1 make progress. We'd like to clear up all of these issues so
2 that we can actually prepare in earnest. But I do think it
3 will rise to that, it's just not tenable to sit there and try
4 and hear and actually work in a matter of this importance.
5 He's faces a mandatory minimum of life without parole.

6 So much, much wider accommodations have been met,
7 and I don't think this is something that should be dismissed
8 out of hand without seeing if there's some way that it can
9 really be accommodated.

10 THE COURT: Let me just ask you this: How does it
11 work when you want to review say a particular document with
12 him? Does he have his copy and you have your copy? Do you
13 have one and press it up against the glass? How does it work?

14 MS. GELERT: I would say that we try and use every
15 way possible. You know, in one of the rooms they have now
16 moved in a longer table, which is somewhat easier, but we
17 still to -- if we're showing him documents, we have to hold
18 them one up on a time while he's reading them, instead of
19 spread documents out on table and look at them.

20 It's also very difficult for us, because often the
21 lawyers will be reading English versions of the same document
22 trying to match up what it is that Mr. Guzman may be looking
23 at, and it's just really not feasible. I don't think under
24 any other circumstances we can imagine that this is how we
25 would prepare for a case of this magnitude, sort of the

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1 government at some point indicated that there's going to be
2 10,000 documents. Are we supposed to sit there and hold up
3 10,000 pages for hours at a time?

4 It's just going to end up with the exact type of
5 problem the Court doesn't want, which is us coming back here
6 on a weekly basis or to the magistrate or litigating with the
7 BOP why this is a decision endlessly. I think it will hinder
8 his right to prepare for trial and it will also hinder our
9 ability to actually meet whatever schedule the Court sets.

10 THE COURT: All right, let me hear from the
11 government.

12 MS. GOLDBARG: Thank you, Your Honor. The case that
13 defense counsel cites is correct. There is no facility or
14 space within the current shoe to allow contact visits, which
15 is why in that case to accommodate the request, the defendant
16 was sent to another state.

17 I don't believe, given the security concerns of
18 bringing the defendant here, that that would be feasible. The
19 area that they're talking about, the space that they want to
20 neat is not a secure space, so that's why the facility cannot
21 do it.

22 The government, working with the MCC, has tried to
23 make sure that the defendant has access. We provided him with
24 a laptop. We provided him with electronic copies of the
25 discovery that defense counsel has as well, therefore, there's

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1 able for a simultaneous viewing of the report. The space that
2 they've talked about, they've discussed ways to improve the
3 sound so that the defendant -- both parties can hear the
4 recordings.

5 We understand that it would be more comfortable to
6 be in the same space, the MCC is saying that they simply
7 cannot, they don't have the ability or facility to accommodate
8 that, and we are working with them.

9 THE COURT: Let me ask you this: Is it really
10 feasible for them to hold up documents to the plexiglass when
11 you have so many documents, and I think Ms. Gelernt at least
12 speaks Spanish, but still, there's going to be a lot of
13 translation involved. How are we going to get the case ready
14 for trial if they have to do that with every document?

15 MS. GOLDBARG: That's why we provided the defendant
16 with a laptop and his own copy of the discovery so they can
17 simultaneously look at the same documents. So it doesn't have
18 to be through the plexiglass, but he has a laptop that he can
19 look at the documents. So we're working with ways to try to
20 facilitate his access to discovery.

21 The defendant gets to keep the laptop in the cell,
22 except when it needs to be charged, and he gets to keep the
23 discovery that we provided. So we believe that that gives him
24 the ability, and if they're sitting next to each other and
25 they both have the same document up, they're looking at it

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1 simultaneously.

2 THE COURT: I thought the laptop was just because
3 he's got a right to his own copy of the documents, it doesn't
4 really address the question. We have some conference call
5 providers that will let you do conference calls by video and
6 you can simultaneously see people what discussing on the
7 screen. They don't have that, do they, they have to each
8 manually pull up a document?

9 MS. GELERNT: No, we don't have any conference
10 system. The problem is that we have to be able to communicate
11 with each other. So, yes, he has a copy. And so he can say,
12 we were sitting at the office and we thought this was
13 important. Now see if you can find that. But we can't
14 actually go over to him and say, I think it's here, open up
15 this file.

16 And I think the point, instead of looking at is
17 there ways in which we can accommodate and bend over backwards
18 to accommodate this, they -- I don't know what the facility is
19 like at MCC, whether there is some other way we can do this,
20 it's been a while since I was in the MCC shoe.

21 But there's also, on the ninth floor, a sort of cage
22 area where other inmates view discovery. We could be there
23 and the MCC could make sure the floor was cleared and no other
24 inmates were on the floor.

25 THE COURT: I understand.

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1 MS. GELERNT: There's other ways, and it shouldn't
2 be that they decide that this is where they're going to house
3 Mr. Guzman and that any problems there are in terms of our
4 preparation they say, well, we don't have a facility that
5 allows for contact visits.

6 THE COURT: Look, I'm not unsympathetic to the
7 government's position in that the mere movement of him out of
8 the shoe into some other area where other prisoners are
9 allowed to go to meet with their counsel over discovery raises
10 the security issues that we've been talking about. On the
11 other hand, it seems to me very cumbersome, very cumbersome,
12 may not be possible, even, to prepare a case this way.

13 MS. GOLDBARG: Your Honor, I don't mean to
14 interrupt, but I do believe the facility has a screen where
15 both parties are able to look at the same document. And so
16 since a lot of exhibits are particularities, we would ask
17 perhaps to have the MCC legal counsel have the ability --

18 THE COURT: Well, I'm thinking I don't want to rule
19 on this by the picture that I might see in my head over it. I
20 think what I want to do is refer it to a magistrate judge to
21 actually go over there and look at the facility and give me a
22 report and recommendation as to what, if anything, should be
23 done. So I'm going to do that, hopefully we can get that done
24 promptly.

25 MS. GELERNT: Thank you, Your Honor.

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1 THE COURT: All right.

2 MS. GELERNT: And then another issue that came up
3 since that we were thinking about in terms of the firewall
4 counsel, and we understand Your Honor's order, there was some
5 language suggested that it might be appropriate to have other
6 agencies do the screening rather than limiting it just to the
7 firewall counsel in terms of visitation or preclearing
8 messages. And I think we would run into the same problems if
9 it was DEA or FBI who would also need firewall agents. So we
10 would just that ask in terms of Your Honor's order regarding
11 that it be limited to the firewall counsel that's been
12 designated.

13 THE COURT: No, I don't want to do that. I think
14 what I had in mind was firewall counsel and/or the usual
15 agencies that would have screening access to any prisoner's
16 communications. And I don't see why we would change that
17 here.

18 MS. GELERNT: I think the only reason we would
19 change it, and correct me if I'm wrong, is I believe the Court
20 included in those other agencies DEA and FBI. So people who
21 are part of the investigation from DEA or FBI should also not
22 be receiving the information, if they are actively part of the
23 prosecution. It's a simple point and that's all we wanted to
24 address.

25 THE COURT: Okay, my inclination is to reject that.

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1 What you're suggesting is almost build more firewalls within
2 the agencies. I'm certainly not going to do that. And it
3 seems to me if we didn't have this conversation at all the DEA
4 and the FBI would have monitoring rights as they have --
5 monitoring abilities as they have over any prisoner. Why is
6 this different?

7 MS. GELERNT: I'm just saying since the Court
8 recognized that the prosecution team itself, the assigned
9 prosecutors, should not have access to the information, it
10 shouldn't be that, for example, the members of the DEA agents
11 who are integral to the team would then obtain the
12 information.

13 THE COURT: I see the logic in what you're saying,
14 but I also don't see the basis for differentiating this from
15 any other case. That's my problem.

16 Now, you know, the fact is that any defendant's
17 ability to covertly or privately communicate is compromised by
18 virtue of being a defendant because the FBI and the DEA can
19 hear their communications, so you're really asking for a
20 special protection, right?

21 MS. GELERNT: Well, it's only special in terms of
22 the fact that generally while it's true for all recorded
23 conversations, the DEA and FBI perhaps by obtaining the
24 evidence from the BOP can monitor, they can't monitor or don't
25 monitor in-person conversations at visits which does not

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1 happen.

2 So I think it's a very simple request, since his
3 only ability to communicate with anybody is in a screened
4 fashion, that simply not be members of the DEA or FBI who are
5 in charge off or working prosecutors who have investigating
6 the case. I think it would also then just make it impossible
7 that what the Court desired is that the information not be
8 passed to the prosecutors, that couldn't be achieved if their
9 same agents were gathering the information.

10 THE COURT: All right, but let me ask the
11 government. Is my assumption correct that the screening
12 agencies who would screen in the ordinary course are the same
13 ones who are involved in this investigation?

14 MS. GOLDBARG: Yes, sir, and that would include also
15 HSI.

16 THE COURT: All right, I will think about your
17 request.

18 MS. GELERNT: Thank you very much.

19 THE COURT: Okay. Are we ready for a trial date
20 now?

21 MS. GELERNT: I believe so, Your Honor.

22 THE COURT: I'm thinking about next February. Is
23 that realistic, unrealistic? Mr. Schneider is shaking his
24 head with a smile.

25 MS. GELERNT: I think we have no idea when discovery

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1 will be complete. Perhaps the government should let us know
2 that first and we then we can work from there.

3 MS. GOLDBARG: Your Honor, February may be early due
4 to the volume of discovery. We are working and we are
5 providing discovery as we review it pursuant to the protective
6 order. Once discovery is complete, we anticipate there will
7 be additional information so February may be kind of
8 optimistic.

9 THE COURT: Do you have a prediction? I assume
10 because I think I've heard this before that there's going to
11 be CIPA proceedings here, right? When are those going to
12 happen?

13 MS. GOLDBARG: We believe that hopefully by the next
14 status conference we will be able to inform the Court if we're
15 ready to have the first status conference on that issue.

16 THE COURT: Okay, let me do this. Let's set a trial
17 date of April 16th. I recognize it is somewhat aspirational,
18 but the parties should understand I'm going to start pushing
19 them harder and harder to get through discovery and set up any
20 motion schedule ahead of that so let's give it the old college
21 try and try to make this date. If that has to slip, it'll
22 slip, but I want to have it on the calendar so no one gets
23 their calendar filled up with something else.

24 MR. SCHNEIDER: That's 2018?

25 THE COURT: Yes.

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1 MR. SCHNEIDER: And how long does the government
2 think this trial is going to last, because I'm going to
3 have -- we're going to have to clear a lot of time I assume.

4 MS. GOLDBARG: It is a little bit early to determine
5 that but we would say possibly between two and three months.

6 THE COURT: That's what I was thinking.

7 MR. SCHNEIDER: Okay.

8 THE COURT: That's fine. Let's set another status
9 conference 90 days out.

10 THE COURTROOM DEPUTY: August 15th at 10 a.m.

11 THE COURT: August 15th, 10 a.m., does that work for
12 everybody?

13 MS. GELERNT: Yes.

14 MS. GOLDBARG: Yes, Your Honor.

15 THE COURT: Okay, I will exclude time until then
16 based on the previous designation of the case as complex and
17 the ongoing discovery. I find the interest of justice
18 outweigh the interest of the public and the defendant as to
19 speedy trial because of those concerns. Anything further?

20 MS. GOLDBARG: Not from the government, Your Honor.

21 THE COURT: Anything else, Ms. Gelernt?

22 MS. GELERNT: No, Your Honor. Thank you, Your
23 Honor.

24 THE COURT: Thank you. We're adjourned.

25 (Whereupon, the matter was concluded.)